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Economic Rationality, Empathy, and Corporate Responsibility

Jeanne L. Schroeder*

Kant v. Economic Rationality

To me, the most interesting portion of Larry Mitchell's book, *Corporate Irresponsibility*,¹ is his Kantian criticism of the concept of corporate "personhood".² To oversimplify, Kant maintains that personhood is nothing but the capacity of self-determination—the possibility of determining one's own ends.³ According to Mitchell, corporations completely lack this capacity because their ends are imposed upon them by corporate law or economic pressures.⁴ That is, corporations and their managers are supposed to maximize profits. Consequently, the law of corporations is internally inconsistent. On the one hand, it claims to treat corporations as legal persons, while, on the other hand, it strips corporations of even the possibility of Kantian personhood.⁵ I wish to chide Mitchell, however, for not following his argument to its logical extreme.⁶ The proposition that the corporation's sole goal is profit maximization, and the conflation of profit maximization with shareholder value maximization, of course, does not come from corporate law, *per se*, but from market forces and from the law-and-economics paradigm of corporate behavior that became predominant in the 1990's. Mitchell's analysis, however, should not be limited to this paradigm in the corporate context because it is equally applicable to almost the entire body of American law-and-economics literature. According to Judge Richard Posner and his followers,

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1 LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* (2001).

2 *Id.* at 32-33, 72-73.

3 Mitchell writes:

Yet the assumptions that underlie liberalism and ground our Constitution and our laws cannot sensibly be applied to the corporation. . . . Thus the corporation as a wholly artificial being lacks the motivational capacities of a real person as well as the ability, so fundamental to liberal theory, to choose and pursue ends for itself. It lacks the moral framework of a natural person.

Id. at 42-43.

4 "So we have the paradox of having created an artificial creature with all of the rights of natural persons to formulate and pursue ends that give its life meaning, but without the ability to choose and pursue those ends." *Id.* at 44.

5 I also believe that Mitchell is much too quick to accept both that corporations as artificial persons in fact heartlessly engage in profit maximization and that natural persons have a natural capacity for moral action. As I shall mention in passing below, from the perspective of the speculative philosophic tradition that began with Kant, human subjects are artificial creations of the law, just as much as corporations. Moreover, all economic activity—corporate or individual—has a fundamental erotic aspect. See generally JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE* (1998) [hereinafter SCHROEDER, *THE VESTAL AND THE FASCES*].

not only corporations, but all economically rational actors are non-persons, from a Kantian standpoint. That is, they act instrumentally to achieve their pre-given irrational ends, but have no rational capacity for choosing their ends.⁶ Because ends are considered entirely irrational, they are treated as pre-given.⁷ As I have written extensively elsewhere,⁸ neo-classical price theory evidences an essential fear and loathing of the freedom that Kant thinks is the essence of personality.⁹

For Kant, the concepts of rationality, freedom and morality are so closely intertwined that they are practically three different names for the same thing, or, perhaps more accurately, they form a holy trinity—rationality being the process of choosing of ends, freedom being the capacity to choose one's ends, and morality being the ends that one rationally and freely chooses.¹⁰ Consequently, Posner's recent vicious attacks against neo-Kantian moral theory¹¹ is consistent with his economic analysis of law. The free person has no place in his vision of "law and economics."¹²

Indeed, economic rationality (the identification of means to a pre-given ends) is not only a denial of Kantian rationality (the identification of ends), but is the opposite of Kantian freedom. Economic rationality is in thrall or servitude to irrational ends, or what Kant calls "pathology." Consequently, law and economics, from a Kantian perspective, is fundamentally immoral.

Altruism and Personhood in the Market

What I want to question today, however, is Mitchell's call to inject certain emotions into corporate decision-making. Mitchell thinks that the corporate fiction separates corporate managers from their empirical humanity,

6 "Rationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have. . . . It does not assume consciousness; it certainly does not assume omniscience." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 17 (1992) [hereinafter POSNER, *ECONOMIC ANALYSIS*]; see Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351 (2001).

7 Consequently, as Posner admits, the assumption of economic rationality is, in fact, dependent on an assumption of irrationality. He states: "preferences cannot be divorced from emotion, or emotion from their stimuli, and so instrumental reasoning cannot be thought pervaded with irrationality merely because a frequent goal of such reasoning is a preference that we would not have if we were not emotional beings." Richard A. Posner, *Behavioral Economics and the Law*, 50 STAN. L. REV. 1551, 1554 (1998) [hereinafter Posner, *Behavioral Economics*].

8 See generally Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality and Legal Scholarship*, 44 WM. & MARY L. REV. 263 (2002) (unpublished manuscript, on file with author) [hereinafter Schroeder, *The Stumbling Block*].

9 *Id.* at 265-67.

10 *Id.*

11 See generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1638 (1998).

12 Consequently, as Posner's economic theory is incapable of recognizing moral theory, and therefore moral personality, Posner is incapable of distinguishing between man and beast. In Posner's formulation, "it would not be a solecism to speak of a rational frog," POSNER, *ECONOMIC ANALYSIS*, *supra* note 6, at 17, or of a rational rat: "Rats are at least as rational as human beings when rationality is defined as achieving one's ends (survival and reproduction, in the case of rats) at least cost." Posner, *Behavioral Economics*, *supra* note 7, at 1551.

and he seeks a way to insert empathy back into the market.¹³ In contrast, I am going to argue that it would be a good thing if, in fact, corporate managers were stripped of their particular emotions. Indeed, this is the whole purpose of markets in a democratic society. Consequently, I think the problem with the economic analysis of corporate law is the opposite, or reverse, of Mitchell's analysis. It allows managers to indulge their particular emotions, while clothing them in the rhetoric of objectivity—namely profit maximization. To me, this is the moral of the Enron debacle—and this might be the intractable problem of law and capitalism.

First, I want to emphasize that I work within the speculative philosophic tradition that springs from Kant, continues through Hegel and, in the twentieth century, includes the psychoanalytic theory of Jacques Lacan. This tradition rejects the liberal distinction between rationality, on the one hand, and emotions, on the other. Rather they are two sides of the same coin—mutually constituting one another. Consequently, not only is all subjectivity—not merely corporate subjectivity—considered to be legal in nature, but law and markets are revealed to be fundamentally erotic.¹⁴ I question, however, the express injection of the emotions of empathy and compassion into the corporate context on both theoretical and empirical grounds. My argument relies on two analyses of markets that are usually thought of as being totally distinct: Hegel's *Philosophy of Right*¹⁵ and Adam Smith's *Theory of Moral Sentiments*,¹⁶ as explicated in Ronald Coase's wonderful essay, *Adam Smith's Theory of Human Nature*.¹⁷

We, as human beings, take on different roles, and engage in different relations in different contexts; the exact interplay of rationality and desire may, thus, be different in different contexts. Mitchell suggests that corporations and their managers should act more like individuals do in their personal lives. But, is this a good idea? Hegel and Smith suggest not.

Hegel agrees with liberal philosophers like Locke and Hobbes that the so-called state of nature (i.e., the hypothetical abstract autonomous individual before the development of law and society) is characterized by particular egoism. He was, however, wary of extrapolating from this hypothetical. For example, Hegel argues that the private realm of family and friendships is, both empirically and logically, appropriately characterized by particular altruism. We love specific individuals for particular, concrete reasons that transcend self-interest.

Hegel suggests, however, that "abstract right"—private law (contract and property) and markets—is, and should be, characterized by a regime of

13 This is the thrust of Chapter 2 of Part 1 of *Corporate Responsibility* entitled *The Perfect Externalizing Machine*. MITCHELL, *supra* note 1, at 49.

14 JEANNE LORRAINE SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* (forthcoming 2003); SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 5.

15 G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H.B. Nisbet trans., 1993).

16 ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., Clarendon Press 1976) (1759) [hereinafter SMITH, *MORAL SENTIMENTS*].

17 R.H. Coase, *Adam Smith's View of Man*, 19 J. L. & ECON. 529 (1976).

universal egoism as both an empirical and a logical matter. That is, it is not at all inappropriate for market participants to act out of self-interest.¹⁸

Hegel does not merely contrast the market, which is characterized by abstract right, with the pre-moral state of nature and the family, which is characterized not by right or mere morality but ethical life. Hegel thought that the modern constitutional, liberal state, which is also located in the realm of ethical life, was an even more developed set of intersubjective relations. The liberal state is appropriately characterized by universal altruism. The state's role, therefore, is not to surpass the market—as abstract right plays an essential role in the creation of subjectivity—but to play a tempering, and restraining role.

This fact means that empathy and care cannot be expected to replace market forces *within the market*. We want a market because the market serves both an economic and a political function.

Here I would like to try to explain what I think the Hegelian insight is through Smith.

Coase maintains that mainstream economists are incorrect in thinking that Smith's theory rests on the assumption that individuals are the atomistic, self-interested, economically rational profit maximizers that inhabit the universe of price theory.¹⁹ Although Smith thought that individuals were motivated by "self-love," Smith agrees with Hegel that self-love could only be atomistic in some hypothesized state of nature before relationships, markets and government. That is, particular egoism could only exist outside of relationships—in the hypothetical liberal state of nature. Actual human beings, however, are located within families and other personal relationships. In the real world, self-love includes our empathy for, and desire to care for and protect, our loved ones.²⁰

Smith, like Hegel, worries not only about extrapolating from the theoretical state of nature to family and other intimate relationships, but also about extrapolating from our experiences in the family to the market and to the state. Smith, like Mitchell, recognizes that our instinct to care is strongest with respect to our immediate families and close friends, and that the instinct dissipates with distance.²¹ Mitchell, coming from a Humean perspective, suggests that care comes from empathy—from recognizing others as being like ourselves.²² We tend not to care about those who are distant because we

¹⁸ Although Hegel's vision of abstract right might initially have much in common with that of price theory, there is a crucial difference. Legal economists assume that all human relations—including the family and the state—are essentially the same as the market. Hegel thought that the market played an essential role, but that it was fundamentally different from these other relationships.

¹⁹ See Coase, *supra* note 17, at 529.

²⁰ "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it." SMITH, *MORAL SENTIMENTS*, *supra* note 16, at 9.

²¹ "Space and time separate us from others. They interfere with our caring mechanisms . . ." MITCHELL, *supra* note 1, at 40.

²² *Id.* at 38-39. As I shall discuss at the close of this essay, Mitchell's reliance on Humean morality is troublesome given his earlier reliance on Kant's theory of personality as rationality

literally do not see them.²³ We need to find a way to make the presence of the distant felt so that we can empathize and care about them.

Smith similarly "makes sympathy the basis for our concern for others. We form our idea of how others feel by considering how we would feel in like circumstances. . . . [B]y an act of imagination we put ourselves in their place,"²⁴ Smith, however, gives an account of how we come to care so strongly about those who are close to us. Love and empathy are normally the natural result of a "common humanity [that] leads us to identify with others."²⁵ Love, thus, is an achievement, created through habitual interrelationships of mutual dependence with other concrete individuals. In Lacanian terms, love is symbolic and legal. This means that the *empirical emotion* of altruism is always particular altruism felt for particular individuals. As a result, the more intimate we are with another person, the more likely, as an empirical matter, that we will feel love or sympathy for and empathy with that person. As a result, as an empirical matter our first and greatest loves are for our parents—on whom we depend—and our children—who depend on us. This love tends to be followed by close affection for siblings and other family members with whom we live.²⁶ We tend to feel less affection for more distant relatives whom we see less frequently.²⁷ Self-love can also cause us to feel strong affection toward friends, and even professional colleagues, with whom we have long term relationships of mutual caring, reciprocal behavior and habitual intimacy.²⁸ Even more distant and abstract relationships—such

(the process of determining one's end) and freedom (the capacity to determine one's end). Not only did Kant believe that, his theory of rationality and freedom necessarily requires his theory of morality. He specifically offered his theory of freedom as a refutation of Hume's empiricism.

²³ "We tend to identify most readily with those who are close to us." *Id.* at 39. He continues:

In a large and diverse society like that of America, most of us are only dimly aware of the existence *as people* of those outside our circles. . . . But mostly we don't think about them at all. Because of this separation, our appreciation of their vulnerability, and our correspondent ability to care, becomes tenuous.

Id.

²⁴ Coase, *supra* note 17, at 529.

²⁵ MITCHELL, *supra* note 1, at 38.

²⁶ In Smith's words, "After himself, the members of his own family, those who usually live in the same house with him, his parents, his children, his brothers and sisters, are naturally the objects of his warmest affections." SMITH, *MORAL SENTIMENTS*, *supra* note 16, at 219.

²⁷ Smith states:

The children of brothers and sisters are naturally connected by the friendship which, after separating into different families, continues to take place between their parents. . . . As they seldom live in the same family, however, though of more importance to one another, than to the greater part of other people, they are of much less than brothers and sisters. As their mutual sympathy is less necessary, so it is less habitual, and therefore proportionally weaker. The children of cousins, being still less connected, are of still less importance to one another; and the affection gradually diminishes as the relation grows more and more remote.

Id. at 220.

²⁸ Smith writes:

Among well-disposed people, the necessity or conveniency of mutual accommodation, very frequently produces a friendship not unlike that which takes place among those who are born to live in the same family. Colleagues in office, partners in trade, call one another brothers; and frequently feel towards one another as if they

as the commonality of living in the same city, or belonging to the same ethnic group—can cause feelings of interdependence and empathy. These feelings are less strong than those we feel towards family and friends, but greater than those we feel towards “foreigners.”

In other words, Smith and Hegel would think that Mitchell is incorrect in suggesting that “space and time . . . *interfere* with our caring mechanisms. . . .”²⁹ Rather, they thought that intimacy, proximity and immediacy *were* the caring mechanism.

To put this in Hegelian terms, personality is created by intersubjective recognition.³⁰ Consequently, those with whom we have better relationships and more opportunities for intersubjective recognition are more important to us. As Smith puts it (when discussing man’s affection for family members): “He is more habituated to sympathize with them. He knows better how every thing is likely to affect them, and his sympathy with them is more precise and determinate, than it can be with the greater part of other people.”³¹

Families and friendships, in other words, are based on *particular*, not universal, altruism. Even though we may believe as a moral or philosophical matter that we should love all of mankind in the abstract, as an empirical matter we feel actual love and affection for particular persons, and we do so for very good reasons. Consequently, it follows that the fewer particular personal contacts we have with a person, and the more distant the relation, the less emotional attachment we will have to them.

As Coase puts it:

Benevolence is highly personal and most of those who benefit from the economic activities in which we engage are unknown to us. Even if they were, they would not necessarily in our eyes be lovable. For strangers to have to rely on our benevolence for what they received from us would mean, in most cases, that they would not be supplied: “. . . man has almost constant occasion for the help of this brethren, and it is in vain to expect it from their benevolence only.”³²

Consequently, an economic system based on “an ethic of care” is not likely to result in the more humane world that Mitchell seeks. When people act out of an *actual* feeling of empathy, they will inevitably favor family and friends over strangers, and favor those they recognize as like themselves over those they see as different. Indeed, Smith and Hegel were arguing from, what was to them, recent historical experience. Government based on care is called feudalism—when all rights and wealth depended on the degree of blood and personal relationship to one’s lord. As Coase notes:

really were so. . . . Even the trifling circumstances of living in the same neighbourhood, has some effect of the same kind.

Id. at 223-24.

²⁹ MITCHELL, *supra* note 1, at 40 (emphasis added).

³⁰ See generally SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 5.

³¹ SMITH, *MORAL SENTIMENTS*, *supra* note 16, at 219.

³² Coase, *supra* note 17, at 544 (quoting ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 14 (Edwin Cannan ed., Modern Library 1937)).

A politician, when motivated by benevolence, will tend to favour his family, his friends, members of his party, inhabitants of his region or country (and this whether or not he is democratically elected). Such benevolence will not necessarily redound to the general good. And when politicians are motivated by self-interest unalloyed by benevolence, it is easy to see that the results may be even less satisfactory.³³

Smith and Hegel, writing at the dawn of the capitalist market and the liberal state, were concerned precisely about how individuals and society could free themselves from the shackles of feudalism, which conflated the individual, the family, economics and the state.

Moreover, if actual empathy is created by proximity and perceived similarity and interdependence, then we should also expect that markets and governments based on affection will have a tendency not merely towards patriotism, but also towards racism and xenophobia. In Smith's words:

Every individual is naturally more attached to his own particular order or society than to any other. His own interest, his own vanity, the interest and vanity of many of his friends and companions, are commonly a good deal connected with it: he is ambitious to extend his privileges and immunities—he is zealous to defend them against the encroachments of every other order of society.³⁴

That is, "the force of benevolence becomes weaker the more remote and the more casual the connection. And when we come to foreigners or members of other sects or groups with interests which are thought to be opposed to ours, we find not simply the absence of benevolence but malevolence."³⁵

As Coase points out, Smith (and I would add, Hegel) does *not* believe that the particular affection one feels towards family and friends is misplaced. But they argue that an economic system based on benevolence will inevitably leave others behind because it is empirically impossible for any individual to engage in the type of interrelations that lead toward actual sympathy with many people.³⁶ As Coase explains: "For strangers to have to rely on our benevolence for what they received from us would mean, in most cases, that they would not be supplied: '... man has almost constant occasion for the help of this brethren, and it is in vain to expect it from their benevolence only.'"³⁷

And, indeed, this is precisely the behavior that seems to have characterized Enron. Not because of, but *despite* their self-serving rhetoric of profit maximization, Enron's managers cared primarily about feathering their own nests and enriching their friends at the expense of other constituencies—in-

³³ Coase, *supra* note 17, at 544.

³⁴ SMITH, *MORAL SENTIMENTS*, *supra* note 16, at 338.

³⁵ Coase, *supra* note 17, at 534.

³⁶ In Smith's words, "[Man] stands at all times in need of the co-operation and assistance of great multitudes, while his whole life is scarce sufficient to gain the friendship of a few persons." ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 14 (Edwin Cannan ed., Modern Library 1937) [hereinafter SMITH, *WEALTH OF NATIONS*].

³⁷ Coase, *supra* note 17, at 544 (quoting SMITH, *THE WEALTH OF NATIONS*, *supra* note 36, at 14).

cluding shareholders and employees. And, let us not forget that in our contemporary economy, in which 401(k) plans have largely replaced traditional defined-benefit pensions, the distinctions between shareholders and employees as separate constituencies, on which Mitchell and others, tend to rely,³⁸ are rapidly breaking down. Those individuals who both lost their jobs and saw their retirement accounts wiped out upon Enron's bankruptcy were assuredly hurt more in their capacity as shareholders than as employees.

The "genius" of the market place, according to Smith, is not that it reflects the true *particular egotistic* nature of man, as the law-and-economics movement assumes. Rather, it is that the market represses man's *particular altruistic* nature into one public sphere.³⁹ By doing so, the capitalist market harnesses self-love so that we, unintentionally, help not only those we care about, but those we do not even know.⁴⁰ As Coase notes, "[t]he great advantage of the market is that it is able to use the strength of self-interest to offset the weakness and partiality of benevolence, so that those who are unknown, unattractive, or unimportant, will have their wants served."⁴¹ This is the meaning of what is probably the most frequently quoted passage in *The Wealth of Nations*:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.⁴²

That is, universal egotism in the market is completely different than the particular egotism of the state of nature and the particular altruism of the family.

The implication of Smith's analysis is that the market serves an essential role in the creation of the liberal state. As already stated, in feudalism the government—which should be universal—was instead characterized by particularity—empirical altruism is always particular altruism. Croneyism was elevated to an ethical value. Democracy, however, requires that all people be recognized as equal, so that the rule of law, not the rule of man, prevails.

A Hegelian analysis brings out an additional point latent in Smith's and Coase's analysis. As I have just stated, Smith and Coase argue not only that particular altruism is a relatively poor basis on which to supply the populace generally with economic goods, but that particular altruism is incompatible with a liberal political system based on liberty and equality. Government based on particular altruism is feudalism, not democracy.

³⁸ See, e.g., MITCHELL, *supra* note 1, at 20-21.

³⁹ Coase writes:

Looked at in this way, Adam Smith's argument for the use of the market for the organization of economic activity is much stronger than it is usually thought to be. The market is not simply an ingenious mechanism, fueled by self-interest, for securing the co-operation of individuals in the production of goods and services.

Coase, *supra* note 17, at 544.

⁴⁰ See *id.*

⁴¹ *Id.*

⁴² SMITH, *THE WEALTH OF NATIONS*, *supra* note 36, at 14.

Unsaid, but implicit in Smith's and Coase's analysis, is that just as the universal egotism that can be so effective and appropriate in a market is incompatible with the very concept of family, it is equally inappropriate as the basis of a political system. The state has a monopoly—it does not compete in a market place that constrains and channels its greed through iron-fisted invisible hands. A universally egotistic sovereign cannot be expected to consider other citizens to be his equal or protect their liberties, let alone care for their needs out of benevolence. Rather, if universal egotism were the rules, we would permit politicians to contingently and temporarily make common cause with certain interest groups to meet their own selfish goals while distributing the minimum crumbs necessary to maintain their position to the rest of society. This is, of course, the cynical view of government offered to us by public choice theorists. This view may or may not be an empirically correct description of government, but it is not the theoretical ideal of democracy. The question for democratic theory is precisely how to squelch these emotions in the public realm in order to approximate this ideal.

Consequently, unlike Smith, Hegel does not defend the universally egotistical market on the practical grounds that it is a more efficient way of providing for the material needs of the populace than benevolence. Although Hegel recognized that such pragmatic, consequentialist reasoning has its place, it is not the stuff of philosophy. Rather, he argues that the universal egotism of the market is *logically*, not practically, necessary for the development of a constitutional democracy.

Hegel argues, in effect, that the universal egotism of the market—which is indifferent to the identity of any particular market actor—enables us to develop a regime of universal altruism at the level of the state. A recent empirical study resulted in the initially surprising suggestion that people who live in developed market economies are significantly more altruistic, generous and trusting than people who live in traditional cultures.⁴³ Economist Samuel Bowles offers a possible explanation for this finding that is similar to my thesis: “Markets teach us to behave decently to strangers. . . . Markets are an arena in which you encounter somebody you’ve never seen before and engage in mutually beneficial activity.”⁴⁴ Bowles suggest that this interaction is in contrast with traditional societies, in which one does not learn to deal with strangers.⁴⁵

The theory of a liberal democracy is that the state, including its politicians and its people, should *act* indifferently between people, at least in the sense that all should be treated the same—accorded the same rights and charged with the same responsibilities—regardless of their personal characteristics. That is, the ringing words of the *Declaration of Independence*—“all Men are created equal, . . . endowed by their Creator with certain unalienable Rights”—is not an empirical claim. Indeed, nothing could be more empirically false. Rather, it is a counterfactual offered as an ethical mandate—society must treat everyone the same *despite the fact that every person is dif-*

43 David Wessel, *The Civilizing Effect of the Market*, WALL ST. J., Jan. 24, 2002, at A1.

44 *Id.*

45 *See id.*

ferent. One should act as though one loves others not because you actually *feel* love for them, and despite the fact that you might *feel* only loathing for them, because it is the ethical thing to do. If we and the state “care” for the people, it is not because we *feel* the particular empirical emotion of love for our neighbors; this is not a matter of natural empathy. There is, in fact, nothing less natural to be empathetic to those we do not know. Rather, insofar as we care for others, it is partially because the universalization of the market helps free us from the particular bonds of the family. Indeed, Kant would go so far as to say that if one acts altruistically because of one’s empirical emotions rather than out of reason, that act is not moral but, being smeared with pathology, is radically evil.⁴⁶ Hegel believes that the market enables us to universalize our empathy beyond those we love. This idea reflects the Hegelian dialectic interrelationship between passion and reason. We care for our families and friends out of passion—we experience the emotion of love, and reason tells us this is proper. But, if we care about our fellow citizens, it because it is ethical to do so—we decide to act as though we love them because reason tells us to.

And now to return to Kant, who is always the starting place of any Hegelian analysis. As I have stated, Kant’s theory of rationality, freedom, and morality are so intimately intertwined that one cannot be understood without the others—that is, one cannot apply a Kantian notion of freedom and rationality without also considering the implications of Kantian moral theory. Mitchell attempts to combine Kant’s theory of personhood as the freedom and capacity to determine one’s ends with Hume’s empirical theory of empathy. Kant, however, thought that his theory of freedom was a refutation of Hume—the stumbling stone on which Hume’s philosophy foundered.⁴⁷ Kant thought that morality was the ends that one freely and rationally chooses. Kant thought that if an act is taken, not out of reason, but because of one’s empirical emotions of empathy and compassion, then that act is not moral. No matter how good its immediate consequences might be, that act has its root (Latin “*radix*”) in pathology, and is, in Kant’s terminology, *radically* evil.⁴⁸ In other words, Hume is an empiricist—he makes morality a matter of fact—the experience of empathy. Kant is a radical anti-empiricist. His mo-

46 HENRY ALLISON, KANT’S THEORY OF FREEDOM 186 (1990); Jeanne L. Schroeder & David Gray Carlson, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653, 671-72 (2000); Schroeder, *The Stumbling Block*, *supra* note 8. Kant boldly asserts:

[The] very feeling of compassion and tender sympathy, if it precedes the deliberation on the question of duty and becomes a determining principle, is even annoying to right-thinking persons, brings their deliberate maxims into confusion, and makes them wish to be delivered from it and to be subject to law-giving reason alone.

IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 144 (T. K. Abbott trans., Prometheus Books 1996). Kant makes this point most forcefully in his late work, *Religion Within the Boundaries of Mere Reason*. IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON (Allen Wood & George Di Giovanni trans. & eds., Cambridge Univ. Press 1998) [hereinafter KANT, RELIGION].

47 “The concept of freedom is the stone of stumbling for all empiricists, but at the same time the key to the loftiest practical principles for critical moralists, who perceive by its means that they must necessarily proceed by a rational method.” IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 18 (T. K. Abbott trans., Prometheus Books 1996).

48 KANT, RELIGION, *supra* note 46, at 49, 59.

rality is not empirical, or in Kant's terminology, it is not phenomenal, but rational or noumenal.

I, like Mitchell, believe that a just society requires a regime of universal altruism that cares equally for the well being of strangers as for friends. I do not believe, however, that this goal can be achieved by encouraging corporate actors to *feel* empathy—empirical empathy is never universal, and particular empathy is destructive to the productive capacity of the market. Moreover, I do not think we can trust management to manage. Rather, it is the state—the realm of abstract universal empathy—that should reign in the worst excesses of corporate egotism through substantive regulation.

I have, thus, come back, by detour through Smith and Hegel, to the great twentieth century debate on corporate management associated with Adolph Berle and Gardiner Means on the one hand, and E. Merrick Dodd on the other. From my perspective, the Berle-Means position is correct at the level of the corporation, and the duty of management should be the universal egotism of the corporation—of course, this means the pursuit of profit—not share maximization. Dodd is, therefore, incorrect in arguing that corporate management should pursue other goals. Dodd, however, is right not about corporations, but about society generally. The state should have goals beyond wealth maximization. In order to achieve these goals, the state may properly reign in the actions of its citizens—both corporations and the individuals who serve as corporate managers.